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IN THE
Supreme Court of the United States
October Term, 1991

THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS ANCILLARY RECEIVER OF TRANSIT CASUALTY COMPANY,

Petitioner,

v.

ALAN DIGIROL,

Respondent.

On Petition For A Writ Of
Certiorari To The Court of
Appeals Of The State Of New York

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. The New York Court's Violation of the Full Faith and Credit Clause Was Timely Raised And Is Properly Before This Court.

Respondent contends that the issue of compliance with the Full Faith and Credit mandate was never raised to the State Courts (Brief in Opp. 1). Respondent immediately thereafter contradicts that position by asserting to this Court that the full faith and credit argument "was almost hidden from view" and was not "highlight[ed]" in the Superintendent's briefs to those Courts (*Id.* at 2). Respondent has thus in effect admitted that the preclusive effect of the Full Faith and Credit Clause was indeed properly preserved by the Superintendent for this Court's review. One need not grace a constitutional argument with neon lights in order to preserve the issue for consideration by this Court.

Moreover, the Superintendent's advocacy of this issue below was in no way "almost hidden from view", as Respondent suggests. In fact, the record clearly shows that the Superintendent vigorously asserted at every stage of the litigation the need to give full faith and credit to the Missouri Order which liquidated Transit and simultaneously cancelled its contracts. *See* Pet. 6-11. The issue was timely asserted before the State Courts with more than adequate precision, and thus was preserved for this Court's review. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980).

Claimant concedes that, even had the issue of compliance with the Full Faith and Credit mandate been raised *for the very first time* on the motion for reconsideration before the Court of Appeals, such argument would have been timely if, as Petitioner contends, the Court of Appeals' decision, which refused to accord full faith and credit to the Missouri Order solely upon purported *contract* principles without reaching Respondent's due process argument, was a "new and unexpected" development (Brief in Opp. 3-5). Claimant argues, however, that the determination was not unexpected, asserting conclusorily that "there was no clear precedent in New York State governing the issue of notice in spite of those cases cited by the 'Transit' Receiver" (Brief in Opp. 4).

This argument is utterly without merit. The Order sought to be reviewed marks an abrupt departure from well-established New York precedent that an Order of Liquidation effects absolute cancellation of insurance policies with or without notice to the insured. *See, e.g., Matter of Empire State Surety Co.*, 214 N.Y. 553, 568-569, 108 N.E. 825 (1915); *People v. Commercial Alliance Life Ins. Co.*, 154 N.Y. 95, 47 N.E. 968 (1897); *Matter of Equitable Reserve Fund Life Assoc. of the City of N. Y.*, 131 N.Y. 354, 378-379, 30 N.E. 114 (1892). The same rule is in effect in Missouri, which issued the Order of Liquidation cancelling Transit's policies, and in virtually all other states. *See* Pet. 22-26. Indeed, it is the reliance by the Court of Appeals upon Mr. Digirol's purported *contractual* rights as the basis for overturning firmly-established law in New York which was "new and unexpected". That alone fully justified the raising of the

Full Faith and Credit Clause on the motion for rehearing and reargument. *See, Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 367 (1932). Thus, even if the Superintendent had not preserved the Full Faith and Credit Clause argument in the Courts below (which was certainly not the case), the violation of that Clause was properly preserved for this Court's consideration.

Inasmuch as the Court of Appeals purported to ignore the due process argument raised by Respondent and determined the case solely upon "contract" principles, the doctrine of Full Faith and Credit is fully applicable. It is settled law that the Full Faith and Credit Clause precludes any inquiry into the substantive merits of a Judgment of a sister state where the Court rendering the Judgment had jurisdiction. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).[1]

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1. As the basis for avoiding the Full Faith and Credit Clause, Mr. Digirol argued to the New York Court of Appeals that the Missouri Court lacked jurisdiction over him. This argument was not reached in the Court of Appeals' decision. In any event, it is clear that Respondent confused the critical issue.

Respondent has not, and cannot, dispute that the Missouri Court properly had jurisdiction over Transit Casualty Company and therefore had the right to place the company in liquidation and to cancel its policies. The Uniform Insurers Liquidation Act expressly provides, with respect to the "conduct of delinquency proceedings against insurers not domiciled in this state," N.Y. Insurance Law §7410(b):

> "The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action, and all books and records of the insurer located in this state, and shall have the immediate right to recover balances due from the local agents and obtain possession of any books and records of the insurer found in this state."

It is thus the domiciliary Liquidation Court, having the absolute right of control over the "contracts . . . located in this state," which

(Footnote continued on the next page)

Clearly, by purporting to look to principles of *New York contract law* in holding, in effect, that the Missouri Court erred in issuing the Order liquidating Transit and cancelling Transit's policies without providing for notice to Mr. Digirol in accordance with the terms of his policy, the Court of Appeals overstepped its bounds. The doctrine of Full Faith and Credit requires that New York give conclusive effect to the express terms of the Missouri Order liquidating Transit. *Milliken v. Meyer, supra; Fiore v. Oakwood Plaza Shopping Center, Inc.*, 78 N.Y.2d 572, 577, 585 N.E.2d 364, 578 N.Y.S.2d 115 (1991).[2]

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has the right to terminate those contracts, just as New York has the right to terminate the contracts of its domiciled insurers upon liquidation. N.Y. Insurance Law §7405(b).

Mr. Digirol cannot claim that he had any "right" to notice of the petition seeking Transit's liquidation, as he concededly had no right to participate in, object to or intervene in that liquidation proceeding. *At most,* Mr. Digirol may argue that he had a purported entitlement to notice of the cancellation of his insurance policy based upon a purported "property right" in that policy. However, Respondent's right to such notice would necessarily depend on whether Respondent actually has a "property interest" in the cancelled policy, or in obtaining a replacement policy, sufficient to require that notice of cancellation be provided. As discussed *infra,* no such "property right" exists.

2. Respondent refers to *Matter of Consolidated Mut. Ins. Co. (Levy),* 77 N.Y.2d 144, 566 N.E.2d 633, 565 N.Y.S.2d 434 (1990), claiming that there the Court of Appeals held, without reference to due process issues, that certain contractual obligations of a liquidated insurer may continue into the future. As discussed *supra,* however, the New York Court of Appeals is prohibited by the Full Faith and Credit Clause from attacking on substantive grounds the Judgment of its sister state, Missouri, where the Missouri Court had jurisdiction to render that Order. *Consolidated Mutual,* with its reliance upon *contract* principles under New York law, is therefore irrelevant.

Moreover, and as noted by the dissenting opinion at the New York Court of Appeals in the instant action, *Consolidated Mutual* involved the obligation to continue retirement benefits provided to the

(Footnote continued on the next page)

2.Claimant Has No Protected Property "Right" in the Notice Provisions of A Policy That Was Terminated By Operation of Law.

Respondent argues that the Missouri Court's Order of Liquidation which cancelled all policies of insurance issued by Transit Casualty Company effective midnight, December 20, 1985 should not be given full faith and credit by the Courts of New York, since it purportedly deprived Digirol of his so-called "property right" to notice of cancellation of his policy without due process of law (Brief in Opp. 5-6).

The Superintendent refrained in his petition from extensive discussion of the merits of Respondent's due process argument, since the New York Court of Appeals purported not to have reached any constitutional issue in rendering the Order sought to be reviewed. It is submitted that Respondent's claim of denial of due process is, in any event, without foundation in law. It is clear that no "property interest" to which due process could attach is involved here, since no such interest could exist with respect to the continuation of the provisions of a policy upon the death of the company which issued that policy.

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insurer's employees and turned on the application of settled legal principles developed under the ERISA vesting scheme. Appendix to Pet., p. 11a, N. 1. What is more, for policy reasons, New York provides a preference to employees of an insolvent insurer in the liquidation proceeding. *See,* N.Y. Insurance Law §7426. Thus, *Consolidated Mutual* involved important policy considerations not extant in the instant case. As the dissent at the Court of Appeals stated:

> "The narrow holding of that case [*Consolidated Mutual*], in an area of law with unique policy concerns, should not be used to justify the unsettling of settled law in another heavily regulated area with its own distinct policy considerations. *Consolidated Mutual* provides no support for the recognition, in a liquidation proceeding, of the executory promise to give notice." Appendix to Pet., p. 11a, N. 1.

In order to prevail upon his claim of deprivation of property without due process of law, Mr. Digirol must first establish the existence of a valid "property" interest within the meaning of the Fourteenth Amendment. *See, Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972). As this Court has recognized, "the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth, supra*, 408 U.S. 564, 572. This Court has repeatedly emphasized that property interests recognized by the Constitution for purposes of procedural due process protection are not created by the Constitution, but must be firmly rooted in an independent source such as state law. *See, e.g., Bishop v. Wood, supra*, 426 U.S. 341; *Paul v. Davis, supra*, 424 U.S. 693; *Board of Regents v. Roth, supra*, 408 U.S. 564.

Here, the "property interest" claimant appears to assert is his so-called "vested right" to pre-cancellation notice, purportedly arising from both a notification provision in the cancelled policy requiring 45 days' notice of cancellation and from statutory provisions. Plainly, no such "property interest" exists. As will be demonstrated, *infra*, state law recognizes no property "right" in the provisions of a policy that has been terminated by operation of law.

Clearly, the mere breach of a contractual right does not amount to a deprivation of property without due process. *See, e.g., McCormick v. Oklahoma City*, 236 U.S. 657 (1915); *Walentas v. Lipper*, 862 F.2d 414 (2d Cir. 1988), *cert. den.* 490 U.S. 1021 (1989); *Boston Env. Sanitation Inspectors Assn. v. Boston*, 794 F.2d 12 (1st Cir. 1986). Even where breach of a contractual right has occurred, there is no deprivation of property within the meaning of the Fourteenth Amendment where claimant has no interest recognized and protected by state law. *Id.* Thus, the issue of whether Mr. Digirol possesses a purported "property right" in the provisions of his cancelled policy must be determined by a consideration of whether state law recognizes and secures such a right.

Unequivocally, Missouri does not recognize any property right in continued application of the provisions of an insurance policy terminated by judicial decree. On the contrary, the law of Missouri is manifest: implicit in any contract entered into with a corporation is the knowledge that the legal effect of an Order of Liquidation is to abruptly fix the rights of all claimants and terminate all policies and executory contracts of the bankrupt corporation. *See, e.g., Carr v. Union Mut. Fire Ins. Co.*, 28 Mo. App. 215 (1887). Indeed, until the Order sought to be appealed from, this was the law in New York as well. *Martyne v. American Union Fire Insurance Co.*, 216 N.Y. 183, 193, 110 N.E. 502 (1915); *People v. American Loan & Trust Co.*, 172 N.Y. 371, 65 N.E. 200 (1902). The well-settled law of Missouri, in any event, is that no claim may be accepted which arose after the cancellation of all policies of a liquidated insurer in accordance with the Order of Liquidation, with or without notice to the insured and regardless of any contractual provision requiring notice. *See, e.g., Thomas v. Land*, 225 Mo. App. 216, 30 S.W.2d 1035 (1930); *Carr v. Union Mut. Fire Ins. Co., supra,* 28 Mo. App. 215.

Nor is there any basis in the statute law of Missouri for Claimant's purported "property right". No statutory requirement exists there that actual notice be provided of the Court-ordered cancellation of the policies of an insolvent insurer.

Thus, while Mr. Digirol had a protected property right (worthy of actual notice) with respect to any claims arising *prior* to liquidation (and, in this case, unearned premiums), he had no constitutionally protected "property right" in the "notice" provisions of a policy of a liquidated company.

This Court has clearly indicated that the degree of notice required by due process is determined by the property interest that is affected. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949). Because, as a matter of Missouri law, no property interest existed with respect to the policy's contractual provisions or future performance under the policy, the constructive notice provided by the filing of the Order of Liquidation, and certainly the publication of that Order by the Receiver in the New York Law Journal and other publications, sufficed

to satisfy any minimal "notice" requirement which might be deemed applicable.

The Receiver's further efforts to give notice are also significant. Although the Missouri Court's Order cancelling Transit's policies contained no provision requiring the giving of any notice to policyholders, the Receiver undertook to notify *each* of Transit's approximately 100,000 insureds by mail between the time the Amended Order of Liquidation issued on December 4, 1985 and the final date for termination of all policies, December 20, 1985. Notification of cancellation was mailed to Mr. Digirol on or about December 13, 1985, to the address listed on the declarations page of the policy,[3] but solely due to post office error, was returned undelivered by the post office.

The undisputed mailing by the Receiver to Mr. Digirol on December 13, 1985, constitutes notice. "Actual notice" does not require "actual receipt" of the notice. Even where property rights are in jeopardy and actual notice is required by an applicable statutory or contractual provision, all that need be shown is that notice was properly sent; proof of actual receipt is *not* required. Thus, in *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. 306, this Court, while holding that persons subject to the loss of a property interest must be given actual notice (e.g., by mail) if their names and addresses are known, noted that on some occasions actual notice by mail would not reach its intended recipient, and stated that non-receipt would not make such notice ineffective. 339 U.S. at 319-320.

We submit that any conceivable constitutional due process requirement as to notice was fully satisfied by the Receiver here. Respondent's assertion, that he was purportedly deprived of a "property right" without due process of law, is without foundation.

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3. Although an amendment in the body of the policy designated a new mailing address, Mr. Digirol testified before the Referee that he regularly received mail sent to the address specified on the declarations page. Mr. Digirol never contested that the address on the declarations page of the policy was a proper address of the insured.

3. The Order Sought To Be Reviewed Has Far-Ranging and Deleterious Implications and Should Not Be Permitted to Stand.

Respondent attempts to minimize the effect of the Court of Appeals' Order, suggesting that it is applicable only to the most unusual circumstance in which a claimant failed to receive a misaddressed cancellation notice. In fact, the Court of Appeals' determination has far-reaching, and most unfortunate, implications. That Order would mandate that the receiver of a foreign insurer provide notice of cancellation in accordance with the terms of each policy issued to New York residents by the defunct insurer, notwithstanding an absolute order of cancellation issued by a sister state. That this would place an undue burden upon liquidators of insurance companies, already facing tremendous difficulties and responsibilities upon the issuance of an Order of Liquidation, *see, e.g., Lac D'Amiante du Quebec, Ltee. v. American Home Assur. Co.*, 864 F.2d 1033 (3d Cir. 1988), cannot seriously be questioned.

Further, a necessary corollary of the decision is that the executory contract obligations of the insurer are deemed "vested" at the time of entry of the Liquidation Order and survive notwithstanding the Liquidation Order. If that be the case, that would indeed signal a profound change in the law, with disturbing consequences. For example, policies which are non-cancellable by their terms (such as certain bonds, life insurance policies and health insurance policies) could *never* be cancelled, notwithstanding liquidation of the company. The far-reaching impact of the Court of Appeals' decision would thus undermine not only the Missouri Court's Order of Liquidation, but the entire liquidation process of a sister state.

The uncertainty which would be injected into the liquidation process, if each state could determine for itself, as a matter of its contract law, which provisions in a policy were terminated by the liquidation of a foreign insurer and which could not be terminated, is incalculable. The decision of the New York Court of Appeals not only lacks any basis in law but adds intolerable uncertainty to liquidation proceedings involving multi-state insurers. That Order should not be permitted to stand.

CONCLUSION

The writ of certiorari should be granted.

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